

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DAVID P. ALEXANDER
MARY E. ALEXANDER

CASE NO. 01-64823

Debtors

Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Presently before the Court is a motion filed by General Motors Acceptance Corporation (“GMAC”) on November 30, 2001. Pursuant to §§ 105 and 502(j) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”) and Rule 60(b) of the Federal Rules of Civil Procedure (“Fed.R.Civ.P.”), incorporated by reference into Rule 9024 of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”), GMAC requests that the Court reconsider the confirmation of the chapter 13 plan (“Plan”) of David P. Alexander and Mary E. Alexander (“Debtors”). Opposition

to GMAC's application was filed on Debtors' behalf on December 13, 2001.

After several adjournments, the application was heard at the Court's regular motion term on April 16, 2002, in Syracuse, New York. Following oral argument, the Court afforded the parties an opportunity to file supplemental memoranda of law. The matter was taken under submission for decision on May 1, 2002.

JURISDICTION

This Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. § 1334(b) and § 157(a), (b)(1) and (2)(A), (B), (L) and (O).

FACTS

On February 24, 1999, David P. Alexander ("D. Alexander") entered an agreement with GMAC which, by its terms, was identified as a lease agreement ("Lease Agreement"). *See* Lease Agreement, annexed to GMAC's Proof of Claim, filed August 31, 2001. *See id.* Pursuant to the Lease Agreement, D. Alexander was obligated to make thirty-six monthly payments of \$186.17 in exchange for use of a 1999 Chevrolet Cavalier (the "Vehicle"). *See id.* Including the amount of \$3,234.93, which was due at the lease signing, D. Alexander's total payments pursuant to the Lease Agreement were to be \$9,750.88. *See id.* The Lease Agreement further provided D. Alexander with an option to purchase the Vehicle for the amount of \$8,219.80 upon the expiration of the lease term. *See id.*

On August 7, 2001, Debtors filed their chapter 13 petition (“Petition”). Annexed to the Petition was their proposed chapter 13 plan (“Plan”). The Plan treated GMAC’s claim as an allowed secured claim in the amount of \$8,219. *See* Plan, at ¶ 4(c)(1). According to the Plan, Debtors chose to exercise the option to purchase the Vehicle that was set forth in the Lease Agreement. *See id.*

The Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines (“Notice”), filed on August 20, 2001, scheduled the hearing on the Plan’s confirmation for September 18, 2001. The Notice also stated that the deadline for filing objections to confirmation was five business days prior to the confirmation hearing date. Thus, the deadline for filing objections was September 11, 2001. The Certificate of Mailing, annexed to the Notice, indicates that the Notice was sent to GMAC at a Dallas, Texas post office box address.

On August 24, 2001, GMAC filed a Notice of Appearance, and it filed a Proof of Claim on August 31, 2001. In its Proof of Claim, GMAC classifies its interest in Debtors’ case as a “secured claim” with a motor vehicle serving as the collateral. The value of the collateral was set forth as \$8,575. Attached to the Proof of Claim was the Lease Agreement between GMAC and D. Alexander, dated February 24, 1999.¹

On September 17, 2001, GMAC filed an objection to the confirmation of Debtors’ Plan (“Objection”). According to GMAC, the term of the Lease Agreement expired on February 24, 2002. *See* GMAC’s Objection, at ¶ 3. GMAC asserted that Debtors’ Plan proposed to pay

¹According to GMAC’s Proof of Claim, Debtors were current with the payments related to the Lease Agreement at the time they filed the Petition. Pursuant to the terms of the Lease Agreement, the monthly payments were due on the twenty-fourth day of each month, and the final payment was due on January 24, 2002. Thus, at the time the Petition was filed, six monthly payments remained before the Lease Agreement expired.

GMAC \$8,219, plus interest at a rate of seven percent, over the Plan's fifty-one month term. *See id.* at ¶ 2. GMAC objected to this treatment by Debtors because it had not agreed to finance the purchase of the Vehicle after the term of the Lease Agreement expired. *See id.* at ¶ 4. GMAC asserted that its "position as a secured creditor is impaired." *Id.* at ¶¶ 5,8. The Objection filed by GMAC was not filed by the deadline of September 11, 2001. Having received no timely opposition to confirmation of Debtors' Plan, the Plan was deemed to have been orally confirmed without a hearing on September 18, 2001.

Also on September 18, 2001, GMAC filed a motion requesting an order directing abandonment and rejection of the unexpired Lease Agreement. GMAC objected to Debtors' refusal to assume the Lease Agreement and Debtors' proposal to "cram-down" the debt owed to GMAC pursuant to the Lease Agreement. GMAC's motion was scheduled to be heard on October 16, 2001. Debtors filed opposition to the motion on October 11, 2001. Though no appearance was made on behalf of GMAC at the hearing on October 16, 2001, Debtors' counsel appeared in opposition to the motion. Consequently, the motion was marked off the Court's calendar. At a subsequent hearing held on April 16, 2002, GMAC's counsel revealed that no appearance was made on GMAC's behalf at the October 16, 2001, hearing because Debtors failed to timely serve their opposition on GMAC, and therefore, GMAC believed that its motion would be granted by default and without need for appearance.

An Order confirming Debtors' Plan was entered on November 9, 2001. On November 30, 2001, GMAC filed this motion requesting that the Court reconsider confirmation of the Plan and permit GMAC to be heard as to the validity of its claim pursuant to its ownership interest in the Vehicle.

ARGUMENTS

GMAC challenges its treatment by Debtors in their Plan. It argues that Debtors should not be permitted to retain the Vehicle without making the remainder of the lease payments and paying the residual value of the Vehicle, as required by the terms of the Lease Agreement. According to GMAC, it did not agree to finance the purchase of the Vehicle for Debtors once the term of the Lease Agreement expired. It also objects to the Plan's treatment of its claim as secured, rather than a lease. GMAC further challenges Debtors' ability to provide for their retention of the Vehicle in the Plan without first moving to assume the Lease Agreement. Pursuant to Code § 365(d)(2), GMAC argues that Debtors were required to file a motion to assume the Lease Agreement prior to confirmation, and their failure to do so precludes them from retaining the Vehicle and providing for installment payments through the Plan. Moreover, the provision for payment of the Vehicle through the Plan without first moving to assume the Lease Agreement left GMAC without adequate notice and is, consequently, a due process violation of the Fifth Amendment to the United States Constitution. GMAC notes that, although it did not timely file its Objection, it did file a motion requesting that Debtors be ordered to abandon or reject their interest in the unexpired lease. Because that motion treated GMAC's interest as a lease, GMAC argues that it ought to serve as a valid objection to confirmation. Furthermore, GMAC should not be prejudiced by its failure to appear in support of that motion because its nonappearance was the direct result of Debtors' untimely opposition to the motion.

In opposition, Debtors argue that there was no need for them to assume the lease prior to Plan confirmation because they treated GMAC's interest as a secured claim not a lease in the

Plan. They further assert that, due to GMAC's failure to timely object to the Plan, the Plan's confirmation serves as *res judicata* to any challenge by GMAC to the Plan's provisions. Finally, in response to the argument that GMAC's motion to compel Debtors to abandon or reject the Lease Agreement should be treated as an objection to confirmation, Debtors note that the motion was not filed by the deadline to file objections. Consequently, it cannot be treated as a valid objection to confirmation.

DISCUSSION

A confirmed chapter 13 plan is binding on all parties, and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect. *See In re Pardee*, 193 F.3d 1083, 1086 (9th Cir. 1999) (citing *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995)). "If a creditor fails to protect its interests by timely objecting to a plan or appealing the confirmation order, 'it cannot later complain about a certain provision contained in a confirmed plan, even if such a provision is inconsistent with the Code.'" *Id.* (quoting *Anderson v. UNIPAC-NEBHELP (In re Anderson)*, 179 F.3d 1253, 1258 (10th Cir. 1999)). The common exception among courts addressing the application of *res judicata* to creditors that have failed to object to plan confirmation is the due process requirement of notice. *See In re Durham*, 260 B.R. 383, 387 (Bankr. D.S.C. 2001) (citing *In re Basham*, 167 B.R. 903, 907 (Bankr. W.D. Mo. 1994)). If a creditor has received adequate notice that its rights would be modified by the plan's treatment of its claim, then that creditor is precluded by the doctrine of *res judicata* from challenging the plan after it has been confirmed. *See id.*

In the matter *sub judice*, GMAC had adequate notice that Debtors' Plan would modify its rights. As evidenced by the Certificate of Mailing annexed to the Notice, filed August 20, 2001, GMAC had been included among those informed of Debtors' Petition. The Notice set forth the date of the confirmation hearing as September 18, 2001. Moreover, it specifically informed creditors that any objection to confirmation must be filed and served no later than five business days prior to the confirmation hearing date. Demonstrating its receipt of the Notice, GMAC filed a Notice of Appearance on August 24, 2001, and a Proof of Claim on August 31, 2001. The Court, therefore, concludes that GMAC had adequate notice of Debtors' bankruptcy filing and Plan confirmation, and GMAC's Fifth Amendment Due Process rights have been preserved.

Although it had notice of the Plan and the confirmation date, GMAC failed to timely file its Objection. Rather, an objection was not filed until September 17, 2001, which was only one day prior to the scheduled confirmation hearing. GMAC also filed a motion to abandon or reject the unexpired lease on September 18, 2001.² GMAC's Proof of Claim and subsequent Objection evidence its knowledge of its treatment as a secured creditor, rather than a lessor, in Debtors' Plan. Because GMAC had knowledge of its treatment in the Plan and failed to timely object, it is bound to the Plan's terms, regardless of whether those terms are inconsistent with the Code.

GMAC requests that the Court reconsider the treatment of its claim pursuant to Code §

²The motion for an order directing abandonment and rejection of the unexpired Lease Agreement requests that the Lease Agreement be deemed rejected, pursuant to Code § 365, and abandoned, pursuant to Code § 554(b). The reason for GMAC's reliance on Code § 554(b) under these circumstances is somewhat unclear. However, the substance of that motion is not before the Court because it was not filed by the deadline for consideration as an informal objection to confirmation and was, consequently, mooted by the Confirmation Order.

502(j). According to Code § 502(j), “[a] claim that has been allowed or disallowed may be reconsidered for cause.” It further states that “[a] reconsidered claim may be allowed or disallowed according to the equities of the case.” This provision provides the bankruptcy court with the power to reconsider the allowance or disallowance of proofs of claim “for cause.” *See In re Colley*, 814 F.2d 1008, 1010 (5th Cir. 1987). This power to reconsider a claim is “virtually plenary.” *Id.* “If reconsideration is granted, the court may readjust the claim in any fashion ‘according to the equities of the case.’” *Id.* (quoting Code § 502(j)). In determining whether “cause” exists to reconsider a claim, courts apply the standards set forth in Fed.R.Civ.P. 60(b), incorporated by reference into Fed.R.Bankr.P. 9024. *See id.*; *In re Snow*, 270 B.R. 38, 41 (D. Md. 2001); *In re Williams*, 276 B.R. 899, 906 (C.D. Ill. 1999). Those standards are:

- (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.”

Fed.R.Civ.P. 60(b).

Based on the facts of the matter before the Court, no “cause” exists, pursuant to the standards of Fed.R.Civ.P. 60(b), for the Court to reconsider GMAC’s claim. GMAC’s proof of claim in Debtors’ case treated its claim as a secured interest, rather than a lease. It set forth the value of its collateral as \$8,575. Moreover, despite having had the requisite notice, GMAC failed to timely file an objection to the confirmation of Debtors’ Plan. Even its motion requesting that Debtors be required to abandon or reject the lease was filed the day on which the confirmation

hearing was scheduled to take place. As a result of GMAC's repeated failure to protect its leasehold interest, Debtors' Plan was confirmed and bound GMAC to treatment as a secured creditor to the extent of the \$8,219 value set forth in the Plan. There is no "cause," pursuant to Code § 502(j), for reconsideration of GMAC's claim and its treatment in the Plan.³

Finally, at the oral argument held on April 16, 2002, GMAC noted that it had filed a timely motion requesting that Debtors be required to abandon or reject the lease. It also stated that that motion was marked off the Court's calendar when counsel for GMAC did not appear in support of the motion as a result of Debtors' untimely service of opposition. According to GMAC, it was denied the opportunity to be heard in support of its motion as a result Debtors' improper service of the opposing papers. Although the Court recognizes the particular circumstances surrounding the motion to require Debtors to abandon or reject the lease, there is no way of obviating the reality that GMAC failed to timely object to confirmation of the Plan, despite having had adequate notice of its treatment therein. Even if the Court construed the motion as a valid objection to confirmation, GMAC would, nonetheless, be unsuccessful. The motion was filed the day the confirmation hearing was scheduled to take place, which was seven days after the deadline for objections. Thus, it cannot be considered as a timely objection. *See In re Minzler*, 158 B.R. 720, 721 (Bankr. S.D. Ohio 1993) (holding motion for relief from stay

³Although the Court has analyzed GMAC's argument for reconsideration pursuant to Code § 502(j), it notes that Code § 502(j) is actually a tool for determining the allowance or disallowance of a claim, rather than the treatment of the claim. *See In re Coffman*, 271 B.R. 492, 497 (Bankr. N.D. Tex. 2002) (stating that "[s]ection 502(j), as well as the cases that have interpreted it, address the allowance or disallowance of a claim, not the reclassification of a claim"). Thus, Code § 502(j) is inapplicable under the circumstances, and the Court's substantive analysis pursuant to that provision is, therefore, inconsequential to the determination regarding reconsideration.

filed by creditor that did not object to confirmation could not be considered as an objection to confirmation because motion was filed after deadline for filing objections).

Based on the foregoing, it is hereby

ORDERED that GMAC's motion for reconsideration of the Order confirming Debtors' Plan is denied.

Dated at Utica, New York

this 24th day of June 2002

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge